Supreme Court, U.S.
FILED
SEP 3 1992
OFFICE OF THE CLERK

NO. 91-1160

IN THE
Supreme Court of the United States

October Term, 1992

A.J. ARAVE, WARDEN,

Petitioner,

v.

THOMAS E. CREECH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF APPLICANT THOMAS GIBSON FOR LEAVE TO FILE AMICUS CURIAE BRIEF SUPPORTING RESPONDENT CREECH

and

CORRECTED AMICUS CURIAE BRIEF OF THOMAS GIBSON

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eBCD Legal Printers, Seattle, Washington

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Applicant Thomas Gibson, through his counsel of record, respectfully requests leave to file the accompanying brief in this case as amicus curiae. Applicant has not obtained formal written consent to file a brief as amicus curiae from counsel for petitioner or respondent.

Applicant Gibson is now a prisoner incarcerated in the Idaho State Correctional Institution under sentence of death. Applicant Gibson's sentence for aggravated murder was imposed by an Idaho state court based solely upon the aggravating circumstance set forth in Idaho Code section 19-2515(g)(6):

> By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

This provision was declared unconstitutionally vague by the United States Court of Appeals for the Ninth Circuit in Creech v. Arave, 947 F.2d 873 (9th Cir. 1991). This Court has issued a writ of certiorari to the

Ninth Circuit and will decide the constitutionality of Idaho Code section 19-2515(g)(6) in this case.

Applicant Gibson has filed a petition for habeas corpus in the United States District Court for the District of Idaho. His petition, inter alia, challenges the application of Idaho Code section 19-2515(g)(6) on the ground that it is unconstitutionally vague. Applicant's habeas corpus proceeding has been stayed by the District Court, pending final ruling case on the constitutionality of Idaho Code section 19-2515(g)(6).

The Respondent in this case seeks affirmance of the Ninth Circuit's ruling that the aggravating circumstance set forth in Idaho Code section 19-2515(g)(6) is unconstitutionally vague. Applicant Gibson supports Respondent's arguments.

Because this court will ultimately decide the constitutionality of the portion of the Idaho statute under which he was

sentenced, applicant Gibson will not have an opportunity to present his arguments challenging the constitutionality of the statute unless he is granted leave to file a brief of amicus curiae. If applicant is not allowed the opportunity to address the constitutionality of the statute in this case, the constitutionality of his sentence under the Idaho statute will thus be decided without applicant having an opportunity to be heard by this Court.

DATED this 4th day of September, 1992.

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CORRECTED BRIEF OF THOMAS GIBSON, AMICUS CURIAE SUPPORTING RESPONDENT CREECH

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Thomas Gibson submits this brief as amicus curiae. Gibson supports affirmance of the Ninth Circuit's decision in Creech v. Arave, 947 F.2d 873 (9th Cir. 1991), holding that Idaho Code section 19-2515(g)(6) is unconstitutionally vague. Gibson supports the position of respondent Creech in this appeal.

Gibson is an inmate in the Idaho State Correctional Institution. On November 5, 1981, he was convicted of first degree murder. The trial judge sentenced him to death based on Idaho Code section 19-2515(f)(6) (now Idaho Code section 19-2515(g)(6)). Gibson was sentenced to death based on the same aggravating circumstance that is at issue in this appeal. Gibson has exhausted state law remedies and has a Petition for Writ of Habeas Corpus pending before the United States District Court for the District

of Idaho. The reasons in support of Gibson's application for leave to file a brief as amicus curiae are stated in the attached motion.

SUMMARY OF ARGUMENT

The brief submitted by respondent Creech fully and persuasively analyzes the unconstitutionality of the Idaho death penalty scheme as it was applied in his case. A review of the application of the same statutory scheme to the facts in Gibson's case highlights the unconstitutional unfettered discretion available to the trial court in sentencing under Idaho Code section 19-2515(g)(6). The Idaho statute violates the Eighth Amendment of the United States Constitution.

ARGUMENT

Since Furman v. Georgia, 408 U.S. 238 (1972), the Court has required that in capital cases the discretion of the sentencing judge "must be suitably directed and limited

so as to minimize the risk of wholly arbitrary and capricious action." (Opinion of Stewart, Powell and Stevens.)

The Court has also held that "'channeling and limiting . . . the sentencer's discretion in imposing the death penalty' is a 'fundamental constitutional requirement.'" Walton v. Arizona, _____ U.S._____, 110 S. Ct. 3047, 3060-61 (Scalia, J. concurring) (quoting Maynard v. Cartright, 486 U.S. 356, 362 (1988)). The Court has required that the "states furnish the sentencer with 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id. (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

The Ninth Circuit has correctly determined that the aggravating circumstance stated in Idaho Code section 19-2515(g)(6) is unconstitutionally vague. Creech v. Arave, 947 F.2d 873, 882-885 (9th Cir. 1991). In

assessing the merit of the Ninth Circuit's conclusion, the Court will be guided by its previous statements in Walton, 110 S. Ct. at 3057. In that case, the Court held that it must first determine whether the applicable aggravating circumstance is too vague and then determine whether the Idaho State Court has further defined the vague terms sufficient to provide "some guidance to the sentencer." Id. at 3057.

This Court has previously explained that such an aggravating circumstance must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

The State of Idaho has failed to provide sufficient guidance to interpret the aggravating circumstance stated in Idaho Code section 19-2515(g)(6). The pertinent provi-

sion states: "By the murder or the circumstances surrounding its commission, the defendant exhibited utter disregard for human life." The Idaho Supreme Court has said that, "[t]he phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold blooded pitiless slayer." State v. Osborn, 102 Idaho 405, 631 P.2d 187, 201 (1981). The Idaho Supreme Court further noted that the aggravating circumstance stated in Idaho Code section 19-2515(g)(6) must be viewed in reference to acts other than those described in other aggravating circumstances. Id. at 200-01.

The facts of Gibson's case make it plain that the aggravating circumstance stated in Idaho Code section 19-2515(g)(6) and the Idaho Supreme Court's interpretation of that language does not furnish the sentencer with clear and objective standards that

provide specific and detailed guidance to insure that the death penalty is not meted out arbitrarily and capriciously.

The Idaho Supreme Court's opinion in State v. Gibson, 106 Idaho 64, 675 P.2d 33 (1983), states the pertinent facts of Thomas Gibson's case. As the court described it, on June 21, 1980, Gibson observed Donald Paradis beat a man named Currier to death in a house in Spokane, Washington. He then observed a witness, Kimberly Palmer, running out of the house and he attempted to stop her. Thereafter, another man present, Larry Evans, strangled her and Gibson believed that she was dead.

Gibson, Paradis and Evans then took the bodies of Palmer and Currier by van from Spokane to Post Falls, Idaho. Gibson testified that he stayed in the van while Paradis and Evans moved the bodies of Palmer and Currier and left them abandoned on a hillside. There was no contrary testimony con-

cerning the circumstances of Palmer's death from any witness at the trial. Paradis did not testify and Evans could not be located. The State offered medical evidence at trial to support its theory that demonstrated that Ms. Palmer died by strangulation in Idaho.

After Gibson was convicted of murder, the trial judge sentenced him to death based on the aggravating circumstance stated in Idaho Code section 19-2515(g)(6) (formerly section 19-2515(f)(6). In his findings supporting the imposition of death, the trial judge found beyond a reasonable doubt:

> (n) That either the defendant, Donald Paradis, or Larry Evans actually killed Kimberly Ann Palmer.
>
> (o) That the defendant either directly committed the act constituting the premeditated murder of Kimberly Ann Palmer or aided and abetted in its commission.

675 P.2d at 45. As Justice Bistline pointed out in dissent, the trial court found that Gibson "may or may not have been the person out of the three possibles who attended to

the strangling of the victim, or was but an aider and abettor." Id. (Emphasis in original.)

The trial judge concluded that Thomas Gibson exhibited utter disregard for human life within the meaning of I.C. 19-2515(g)(6), even though the trial judge did not know who killed Ms. Palmer, did not know where she was killed, and did not know the circumstances of her killing. The trial judge only knew that Thomas Gibson was there.

Larry Evans, who the trial judge had found to present at the scene of the crime, was later apprehended and tried for the killing of Ms. Palmer in Idaho. He was acquitted.

CONCLUSION

Thomas Gibson's case further demonstrates to this Court that the aggravating factor set forth in Idaho Code section 19-2515(g)(6) is unconstitutionally vague. The Court must affirm the decision of the

Ninth Circuit in Creech v. Arave, holding that Idaho Code section 19-2515(g)(6) is unconstitutionally vague.

DATED this 4th day of September, 1992.

SHORT CRESSMAN & BURGESS

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